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87-1967

Supreme Court, U.S.
FILED
FEB 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

OCTOBER TERM, 1987

JOHN EMIL BOMHARDT,
Appellant

v.

STATE OF MARYLAND,
Appellee

On Appeal From the Court of Special
Appeals of the State of Maryland

JURISDICTIONAL STATEMENT
APPENDIX

ANDREW J. GROSZER, JR., ESQUIRE
12209 Happy Hollow Road
Cockeysville, Maryland 21030
(301) 561-8047
Counsel of Record

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN EMIL BOMHARDT
Appellant

v.

STATE OF MARYLAND
Appellee

On Appeal From the Court of Special Appeals of the State of Maryland

---

JURISDICTIONAL STATEMENT

APPENDIX

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APPENDIX TO

JURISDICTIONAL STATEMENT

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CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution

Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Fourteenth Amendment, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Sixteenth Amendment:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without regard to any census or enumeration."

United States Statutes

U.S.C. Title 26, Internal Revenue Code:

Section 61. Gross income defined.

"(a) General definition - Except

as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items;

(2) Gross income derived from business;

(3) Gains derived from dealings in property;

(4) Interest;

(5) Rents;

(6) Royalties;

(7) Dividends;

(8) Alimony and separate maintenance payments;

(9) Annuities;

(10) Income from life insurance and endowment contracts;

(11) Pensions;

(12) Income from discharge of indebtedness;

(13) Distributive share of partnership gross income;

(14) Income in respect of a dece-

dent; and

(15) Income from an interest in an estate or trust."

Section 6012. Persons required to make returns of income.

"(a) General Rule - Returns with respect to income taxes under subtitle A shall be made by the following:

(1)(A) Every individual having for the taxable year a gross income of $1,000 (the exemption amount) or more, except that a return shall not be required of an individual (other than an individual described in subparagraph (C)) -

....

(iii) who is entitled to make a joint return under section 6013 and whose gross income, when combined with the gross income of his spouse, is, for the taxable year, less than $5,400 (the sum of twice the exemption amount plus the zero bracket amount applicable to a joint return), but only if such individual and his spouse, at the close of the taxable year, had the same household as their home."

Maryland Statutes

Article 81, Revenue and Taxes:

Section 288, Imposition of tax.

"(a) Tax on individuals - There is hereby levied and imposed for each calendar year beginning after December 31, 1966, a tax on the taxable net income, as defined in Section 280 (a) of every resident individual of this State and on the taxable net income, taxable in this State, of every individual not a resident of this State."

Section 294, Who shall file returns.

"(a) Individuals generally. - (1) Every individual resident of this State, and every individual not a resident of this State, receiving income derived from sources within this State, other than fiduciaries, who is required to file a federal income tax return under the provisions of Section 6012 (a) of the Internal Revenue Code, as amended from time to time, or whose federal income together with any modification additions contained in Section 280 (b) of this subtitle exceed the limits provided by said Section 6012 (a), shall file with the Comptroller a return in such form as the Comptroller shall prescribe, ..."

Section 297, Copy of federal return may be required.

"Whenever in the opinion of the Comptroller it is necessary to

examine the federal income tax return or a copy thereof, of any taxpayer in order properly to audit the returns of such taxpayer, the Comptroller shall have the right to compel the taxpayer to produce for inspection a copy of such return and all statements and schedules in support thereof."

Section 304, Administration.

"(b) Records, statements and returns. - Every taxpayer liable to any tax imposed by this subtitle shall keep such records, render such statements, file such returns, and comply with such rules and regulations as the Comptroller from time to time may prescribe. Whenever the Comptroller judges it necessary he may require any taxpayer by notice served upon him to file a return, render such statements, or keep such records as he deems sufficient, to show whether or not such taxpayer is liable to tax under this subtitle and the extent of such liability."

Section 310, Refunds.

"(a) In general. - In the event any person pays more tax than is found to have been due, the Comptroller shall refund the overpayment in the manner herein provided except that any refund in an amount less than one ($1.00) dollar shall not be made.

(b) Form of claim; time of filing. - Any claim for a refund made under and pursuant hereto shall be in such form, verified in such manner, contain such information, and be supported by such documents as may be prescribed by regulations of the Comptroller and shall be filed within three years from the date the return was due to be filed."

Section 320, Failure to file a return or report required by this subtitle.

"The failure on the part of any person or taxpayer to file a return or report as required by the provisions of this subtitle, or to comply with any action taken by the Comptroller pursuant to Section 304 hereof shall be deemed a violation of the provisions of this subtitle subject to penalty and interest as prescribed in Section 318 hereof. The wilful failure on the part of any person or taxpayer to file a return or a report as required by the provisions of this subtitle or to comply with any action taken by the Comptroller pursuant to Section 304 hereof shall be a misdemeanor, subject to a fine of not exceeding five hundred dollars ($500) or imprisonment for not exceeding six months, or both, in the discretion of the Court."

No. ____

JOHN E. BOMHARDT

Appellant

v.

STATE OF MARYLAND

Appellee

In the Court of Special Appeals

of Maryland

October Term, 1987

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that John Emil Bomhardt, the appellant above-named, hereby appeals to the Supreme Court of the United States from the opinions and judgments of this Court in the above captioned case, No. 1453, September Term, 1985 and No. 1509, September Term, 1986, which together are now the final judgment

affirming the conviction entered in the Circuit Court for Anne Arundel County, Maryland.

A petition to the Court of Appeals of Maryland for writ of certiorari to review the opinion issued in No. 1509 on June 11, 1987 and the mandate issued on July 13, 1987 was denied on November 20, 1987. That denial includes refusal of the appellant's prayer to review the judgment of No. 1453 which disposed of the federal questions.

An earlier petition to the Court of Appeals of Maryland for writ of certiorari to review the opinion issued in No. 1453 on September 8, 1986 and the mandate issued on October 8, 1986 was denied on January 2, 1987.

This appeal is taken pursuant to Section 1257(2) of Title 28 of the United States Code.

ANDREW J. GROSZER, JR., Esq.
12209 Happy Hollow Road
Cockeysville, Maryland 21030
(301) 561-8047
Counsel for Appellant

Filed February 4, 1988

No. ____

JOHN EMIL BOMHARDT

Appellant

v.

STATE OF MARYLAND

Appellee

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

October Term 1987

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the

foregoing Notice of Appeal to the United States Supreme Court was mailed to J. Joseph Curran, Attorney General, Seven North Calvert Street, Baltimore, Maryland 21202 and to Daniel Anderson, Assistant Attorney General, at the same address on the 4th day of February, 1988.

Andrew J. Groszer, Jr., Esq.
Attorney for Appellant

Filed February 4, 1988.

JOHN EMIL BOMHARDT

v.

STATE OF MARYLAND

In the Court of Appeals of Maryland

Petition Docket No. 316

September Term, 1987

(No. 1509, September Term, 1986

Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorai is desirable and in the public interest.

Robert C. Murphy

Chief Judge

Date: November 20, 1987

MANDATE

COURT OF SPECIAL APPEALS

No. 1509, September Term, 1986

John Emil Bomhardt

v.

State of Maryland

JUDGEMENT: June 11, 1987: Opinion by Gilbert, C.J. Judgement affirmed. Costs to be paid by appellant.

July 13, 1987: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for Anne Arundel County 9216

Record 40.00

Stenographer Costs.....49.50

In Court of Special Appeals:

Filing Record on Appeal.....50.00

Printing Brief for Appellant....96.00

Printing Brief for Appellee.....52.80

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special

Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this Thirteenth day of July A.D. 1987.

Howard E. Friedman

Clerk of the Court of Special Appeals.

Costs shown on this mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

NO. 1509

September Term, 1986

JOHN EMIL BOMHARDT

v.

STATE OF MARYLAND

Gilbert, C.J.

Bloom
Karwacki,

JJ.

OPINION BY GILBERT, C.J.

Filed: June 11, 1987

"If, as some assert, the law is the light of the land, taxes are the batteries that power the light."[1]

Probably since taxes were first levied, few have enjoyed paying them. Fewer yet have defied the right of the sovereign to assess taxes. Still fewer have been successful in their defiance of the tax laws. This case represents one of the latter majority.

As part of his continuing battle against paying Maryland income taxes, John Emil Bomhardt avers that the Attorney General was not empowered to sign a Criminal Information. Proceeding

from that premise, Bomhardt reasons that since the Attorney General did not sign the Criminal Information upon which Bomhardt was tried the convictions are invalid. Hence, he urges us to reverse the judgments of the Circuit Court for Anne Arundel County and concomitantly direct his release from confinement. We shall do neither but rather affirm the judgements. We explain.

Mr. Bomhardt's first appeal to this court was the result of his being convicted of willfully failing to file State income tax returns for the years 1981, 1982, and 1983. In his initial appeal he posited six questions, including a challenge to the authority of the Attorney General to act as prosecutor. We perceive no error in the trial proceedings with respect to five of the issues raised by Bomhardt; but, in an

unreported opinion, Bomhardt v. State, No. 1453, September Term, 1985 (filed September 8, 1986) (unreported), we ordered "a limited remand under rule 1071 to the trial court for the sole purpose of ascertaining whether the Attorney General possessed authority to maintain this prosecution." The convictions remained in effect pending those further proceedings.

Pursuant to that limited remand, a hearing was held before Judge Eugene M. Lerner. At that hearing a March 9, 1984 letter from then-Governor Harry Hughes to the then-Attorney General Stephen H. Sachs was admitted into evidence. The letter read, in pertinent part:

> "... I hereby authorize and direct the Attorney General to act with the same powers as the State's Attorney for Anne Arundel County in the investigation and prosecution of cases involving criminal violations of the Maryland income tax laws

> which are brought to your attention by the Comptroller's office for proscution in Anne Arundel County.
>
> .... You are authorized to use any necessary subpeona powers to present to the Grand Jury for Anne Arundel County any evidnce or testimony you consider appropriate to carry out this authorization. You are further authorized, in this category of criminal actions, to act with the same authority as the State's Attorney for Anne Arundel County to bring and prosecute resulting criminal charges."

Judge Lerner ruled that the "gubernatorial authorization (in the March 9 letter) cloaked the Attorney General with the requisite authority under Article V, Sect. 3 of the Constitution of Maryland to investigate and prosecute (Mr. Bomhardt)." Consquently, he ordered the convictions to stand.

Article V, Sect. 3 of Maryland's Constitution provides, in pertinent part:

"(a) The Attorney General shall:

....

> (2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have directed or shall directed to be investigated, commenced and prosecuted or defended.
>
> (3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting officer in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any Court of this State."

The Court of Appeals has explained that Article V, Sect.3(a)(2) "vests the Attorney General with ... prosecutorial powers." In re Special Investigation No. 281, 299 Md. 181, 199, 473 A.2d 1, 10 (1984).

The Governor's letter authorized and

directed the Attorney General to "act with the same powers as the State's Attorney ... in the investigation and prosecution of (the instant case and authorized the Attorney General) to act with the same authority as the State's Attorney ... to bring and prosecute resulting criminal charges."[2] Persuant to Article V, Sect. 3, similar authority and power have been conferred by the Governor on the Attorney General, see, e.g., In Re: Special Investigation No. 195, 295 Md. 276, 277, 454 A.2d 843 (1983); Wiener v. State, 290 Md. 425, 428, 430 A.2d 588, 591 (1981), and upheld on appeal, In re Special Investigation No. 281, 299 Md. 181, 199-200, 473 A.2d 1, 10 (1984), In Re: A Special Investigation No. 277, 55 Md. App. 650, 655, 466 A.2d 48, 51 cert. denied, 297 Md. 417 (1983).

As Chief Judge Murphy opined for this court[3] in State v. Hunter, 10 Md. App. 300, 305, 270 A. 2d 343, 345 (1970), modified on other grounds, 263 Md. 17, 278 A.2d 608 (1971), "Under the Constitution and laws of Maryland, the State's Attorney is a constitutional officer elected by the people and entrusted by them with the prosecution of persons accused of crime." It is the duty of the State's Attorney to "prosecute ..., on the part of the State, all cases in which the State may be interested...." Md. Ann. Code Art. 10, Sect. 34. In performing that duty, it is within the State's Attorney's discretion "to determine the mode or means ... to initiate the criminal charges." Wodoslawsky v. State, 36 Md. App. 654, 659, 374 A.2d 917, 920 cert. denied, 281 Md. 746 (1977), 434 U.S. 1068, 98 S. Ct. 1248, 55 L. Ed. 2d

770 (1978).

The offense of willfully failing to file a state income tax return is a misdemeanor, Md. Ann. Code Art. 81, Sect. 320, and is within the district court's exclusive original jurisdiction, Md. Cts. & Jud. Proc. Code Ann. Sect. 4-301(b)(1). The prosecution for that offense may be commenced by either a criminal information or a statement of charges. Md. Rule 4-201(b)(1) and (2). Md. Rule 4-202(b) requires that a criminal information must be "signed by the State's Attorney of a county or by any other person authorized by law to do so."

The State's Attorney for Anne Arundel County was fully empowered to sign and file in the district court a criminal information against Mr. Bomhardt alleging willful failure to file 1981, 1982, and 1983 State income tax returns. In the

matter sub judice, on or about April 10, 1985, the Attorney General filed in the district court[4] a criminal information which had been signed by the Attorney General[5]. Under Article V, Sect. 3, together with the direction contained in the Governor's letter, the Attorney General was fully vested with the power to "commence" and prosecute these criminal charges.

Governor Hughes's letter to the Attorney General extended authority to investigate and prosecute "cases involving criminal violations of the Maryland income tax laws which are brought to (the Attorney General's) attention by the Comptroller's office for prosecution in Anne Arundel County." Mr. Bomhardt argues that this extension exceeds the "category of ... suits or actions" contemplated by Article V, Sect.

3, thus making the grant of authority "overbroad in nature and ... unconstitutional." We do not see it that way.

Past Gubernatorial grants of authority to the Attorney General under Article V, Sect. 3 of the Constitution have included investigation and prosecution in the following categories of actions: various forms of criminality in Frederick County including illegal drug activities and State income tax violations, Winters v. State, 301 Md. 214, 220, 482 A.2d 886, 889 (1984); Medicaid fraud, In Re: Special Investigation No. 244, 296 Md. 80, 87-88, 459 A.2d 1111, 1114-15 (1983); misuse of state services and personnel by the Anne Arundel County Public Defender, Wiener v. State, 290 Md. 425, 428, 430 A.2d 588, 591 (1981); corruption of public officials in connection with the arrest, prosecution, and escape of an

individual from the Baltimore County jail, Green v. State, 25 Md. App. 679, 682, 337 A.2d 729, 731, cert. denied, 275 Md. 749 (1975); Irvin v. State, 23 Md. App. 457, 459, 328 A.2d 329, 331 (1974), aff'd, 276 Md. 168, 344 A.2d 418 (1975); overpayment in state and county funds to school bus contractors in Charles County, Maloney v. State, 17 Md. App. 609, 614-15, 304 A.2d 260, 263-64, cert. denied, 269 Md. 761, 762, 767 (1973).

Mr. Bomhardt's attack on the Governor's direction to the Attorney General as being overly broad fails. The directive was supported by the clear language of the Maryland Constitution and by case law.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT

FOOTNOTES

[1] Attributed to Jim Oigan. See

Republic Ins. Co. v. Bd. of County Comm'rs, 68 Md. App. 428, 429 n.1, 511 A.2d 1136 (1986).

[2] For a background of the relationship between the offices of State's Attorney and Attorney General, see Murphy v. Yates, 276 Md. 475, 348 A.2d 837 (1975); State v. Hunter, 10 Md. App. 300, 305-07 n.5, 270 A.2d 343, 345-46 (1970), modified on other grounds, 263 Md. 17, 278 A.2d 608 (1971).

[3] The Honorable Robert C. Murphy was appointed in 1967 as the first Chief Judge of the Court of Special Appeals. He served in that position until August 11, 1972, when he was appointed Chief Judge of the Court of Appeals, a post he currently holds.

[4] Upon Mr. Bomhardt's demand for a jury trial, the cases were removed to the circuit court and the offenses were tried on the charging documents filed in the district court. Md. rule 4-201(c)(3).

[5] On the first day of trial, Mr. Bomhardt cited the three year statute of limitations for commencement of prosecution for willful failure to file a State income tax return, Md. Ann. Code art 81, sect. 321, and moved to dismiss count one which alleged his willful failure to file a 1981 return. The limitations period for that offense began April 15, 1982. The charging document in the record at that time was a statement of charges issued by a judicial officer on May 2, 1985. The State explained that a criminal information was filed in April

prior to the end of the statutory period. When service was attempted soon thereafter, Mr. Bomhardt refused to accept the summons, and a new statement of charges that led to Mr. Bomhardt's arrest was issued in May.

During the trial, the State introduced a copy of a statement of charges against Mr. Bomhardt which had been issued by a judicial officer of the district court on April 10, 1985. Accompanying that statement of charges were three undated writings entitled "COUNT 1 ... COUNT 2 ... (and) COUNT 3," respectively. The writings elaborated on the charges. Judge Lerner ruled that a criminal information had been "properly filed," and he denied the motion to dismiss count one.

We note the erratic and confusing manner in which the charging documents were processed in this case and suggust that the better practice is to proceed with either an information or a statement of charges as Md. Rule 4-201 provides and to label clearly a criminal information when that document is used. While these suggestions relate to form rather than substance, see Brown v. State, 285 Md. 105, 108-09, 400 A.2d 1133, 1135-36 (1979), consistency and clarity of form in charging documents both simplify and increase the effectiveness of litigation as well as remove unnecessary distraction from substantive issues.

IN THE CIRCUIT COURT FOR

ANNE ARUNDEL COUNTY

CRIMINAL NO. 9216

STATE OF MARYLAND

v.

JOHN EMIL BOMHARDT
Defendant

MEMORANDUM OPINION AND ORDER

The within matter was tried by this Court with a jury on October 9 and 10, 1985. At the conclusion of the case, the Defendant was found guilty of three counts of wilfull failure to file income tax returns for the years 1981, 1982, and 1983. The Defendant subsequently appealed, and pursuant to an unreported Opinion issued by the Court of Special Appeals on September 8, 1986, the conviction of the Defendant was affirmed contingent upon this Court determining

whether the Attorney General possessed the requisite authority pursuant to Article V, Sect. 3 of the Maryland Constitution to investigate and prosecute the Defendant.

Pursuant to the mandate of the Court of Special Appeals, a hearing was held in this Court on October 27, 1986, at which time the Court heard argument on behalf of the State and the Defendant. In addition, the parties stipulated into evidence a letter dated March 9, 1984, from Governor Harry Hughes to Attorney General Stephen H. Sachs in which the Governor authorized and directed "the Attorney General to act with the same power as the State's Attorney for Anne Arundel County in the investigation and prosecution of cases involving criminal violations of the Maryland income tax laws." State's Exhibit 1. In addition,

it was stipulated by counsel for the Defendant that the prosecutor in this case, Daniel R. Anderson, was an Assistant Attorney General at all times pertinent hereto.

Although the Defendant argues that this grant of authority by the Governor to the Attorney General was overbroad in nature and therefore unconstitutional, this conclusion is not supported by the clear language of the Maryland Constitution or by caselaw. Article V, Sect. 3(a) of the Constitution of Maryland clearly permits the Governor to authorize the Attorney General to prosecute any category of cases as directed by the Governor. In particular, this section of the Constitution provides that the Attorney General may:

> (2) Investigate, commence and prosecute or defend any civil or criminal suit or action or <u>category</u>

> f such suits or actions in any of the federal courts or in any court of this state, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct to be investigated, commenced and prosecuted or defended.
>
> (3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting attorney in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any court of this state.

MD. CONSTITUTION, Art. V, Sect. 3(a) (emphasis added). These provisions of the Constitution are bolstered by caselaw which upholds the Governor's right to authorize the Attorney General to investigate and prosecute a category of cases. See In Re Special Investigation No. 244, 296 Md. 80 (1983). This Court rejects the argument made by the De`endant that

the grant of authority contained within the letter of March 9, 1984 from Governor Hughes to Attorney General Sachs is overbroad.

This Court therefore finds that the gubernatorial authorization contained within Governor Hughes' letter of March 9, 1984 to Attorney General Sachs provided to the Attorney General the requisite authority under Article V, Sect. 3 of the Constitution of Maryland to investigate and prosecute the Defendant in this case. As an Assistant Attorney General, Daniel R. Anderson was authorized to act in this case with the same powers as the State's Attorney for Anne Arundel County in the investigation and prosecution of the Defendant.

WHEREFORE, in light of this Court's findings and those of the Court of Special Appeals in its unpublished

Opinion dated September 8, 1986, it is hereby ORDERED that the judgments of convictions originally entered herein on November 26, 1985, hereby stand.

Judge Eugene M. Lerner
Circuit Court for
Anne Arundel County

Filed: October 29, 1986

JOHN EMIL BOMHARDT

v.

STATE OF MARYLAND

In the Court of Appeals

of Maryland

Petition Docket No. 418

September Term, 1986

(No. 1453 September Term, 1985

Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

Robert C. Murphy
Chief Judge

Date: January 2, 1987

MANDATE

Court of Special Appeals

of Maryland

No. 1453, September Term, 1985

John Emil Bomhardt

v.

State of Maryland

September 8, 1986: Per Curiam filed. Case remanded without affirmance or reversal to the Circuit Court for Anne Arundel County for the purpose of conducting a hearing on the authority of the Attorney General to prosecute these charges. The judgments on conviction remain in effect pending further proceedings. Costs to be paid five-sixths by appellant and one sixth by Anne Arundel County.

October 8, 1986: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for Anne Arundel County

IND No. 9216

Record.....$40.00

Stenographer's Costs.....$600.00

In Court of Special Appeals:

Filing Record on Appeal...$50.00

Printing Brief for Appellant....
.....$211.20

Reply Brief.....$

Portion of Record Extract -
Appellant.....$

Printing Brief for Cross -
Appellee.....$

Printing Brief of Appellee.....
.....$163.20

Portion of Record Extract -
Appellee.....$

Printing Brief for Cross -
Appellant.....$

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this Eighth day of October A.D. 1986.

Howard E. Friedman

Clerk of the Court of Special

Appeals of Maryland

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1453

September Term, 1985

JOHN EMIL BOMHARDT

v.

STATE OF MARYLAND

Bishop
Bloom
Bell, Rosalyn B.,

JJ.

PER CURIAM

Filed: September 8, 1986

John E. Bomhardt was convicted by a jury in the Circuit Court for Anne Arundel County of three counts of State income tax evasion. The court sentenced him to six month consecutive terms of imprisonment on each count and imposed a fine of $1500. Mr. Bomhardt appeals to this Court raising six questions for our resolution:

> "I. Does a trial judge lack jurisdiction to sentence a defendant to imprisonment for willful failure to file income tax returns when the Information supplying the charge of willfullness (sic), initiated by the Attorney General with undisclosed authority, is not entered until after the defense rests?
>
> "II. Has a defendant in an income tax case been denied an impartial jury where an Internal Revenue agent remains on a jury throughout voir dire?
>
> "III. Is the duty of a married

technician to file Maryland income tax forms, because he recieved wages for labor, stated in Article 81 of the Annotated Code of Maryland with sufficient clairity and certainty to impose criminal sanctions?

"IV. Has the Comptroller for the State of Maryland arbitrarily and capriciously prescribed income tax forms for filing returns that discriminate against the equal opportunity of Maryland residents receiving wages for labor to freely and voluntarily assert the consideration given in the contract for labor?

"V. Does a jury have sufficient evidence to find the elements of willfullness (sic) to support a guilty verdict where the State's exhibits show a defendant considered his conduct to be in conformity with the law?

"VI. Is a trial court's instructions on willfullness (sic) which holds the defendant to a standard of reasonableness erroneous?"

We find merit to only one of appellants challenges and affirm subject to a limited remand.

JURISDICTION

- INFORMATION -

a. Jurisdiction

The record reflects that the Application for Statement of Charges, filed on April 10, 1985, contains the phrase "wilful failure to file taxes." When service of process was first attempted on May 1, 1985, appellant refused to accept the summons and Information; therefore, a warrant was obtained for his arrest. A second statement of charges was filed on May 2, 1985, which omitted the term "wilful", and merely charged him with "failure to file" taxes. Appellant was arrested based on this second statement of charges. Admittedly, a proper Information was filed before the case was completed. After the defense rested, the State filed a statement of charges with the court which did contain the word "wilful."

Appellant asserts the court lacked jurisdiction to sentence him because the Information supplying the charge of "wilful failure to file" income tax returns was not filed until after the defense rested. We hold that the trial judge did have jurisdiction and appellant waived his right to raise this defect.

"(The) primary purpose of a charging document is to fulfill the constitutional requirement contained in Article 21 of the Maryland Declaration of Rights that each person charged with a crime must be informed of the accusation against him." Williams v. State, 302 Md. 787, 790-91 (1985). The court in Williams, supra, established a two-pronged test. First, the charge must characterize the crime. Second, it must describe the alleged criminal act in enough detail to inform the accused of the specific conduct with

which he is charged. Id. at 791.

> "(I)n determining, for jurisdictional purposed, whether an indictment sufficiently charges and characterizes a crime, (it is clear) that merely because the charging document does not allege, expressly or by implication, every essential element of an offense does not necessarily mean that no cognizable crime within the court's subject-matter jurisdiction has been charged (W)hile the customary method of identifying a particular crime charged in an indictment has been to aver its essential elements, that method is not exclusive...."

State v. Chaney, 304 Md. 21, cert. denied, 106 S. Ct. 824 (1985). It is not necessarily fatal if the words of the indictment leave unspecified one or more essential elements of the crime. Jones v. State, 303 Md. 323, 337 (1985), quoting State v. Coblentz, 167 Md. 523, 529 (1934). Furthermore, the particular conduct necessary to establish an offense need not be alleged as elements in the charging document. Jones, supra at 337.

In the case sub judice, appellant

received a copy of the statement of charges which referred to the charge as "failure to file" an income tax return. This phrase adequately fulfills both prongs of the Williams, supra, test in that it characterizes and describes the crime. Appellant knew he was being charged with a criminal violation of Md. Code Ann. Art. 81, Sect. 320 (1957, 1980 Repl. Vol., 1985 Cum. Supp.). He refers to this section of the Code in his pleading entitled "Specific Objection to States (sic) Response to Notice of Special Continuing Appearance." Article 81, Sect. 320, supra, includes only one criminal offense, the willful failure to file tax returns. Therefore, it is reasonable to conclude that appellant was aware he was being charged with this particular crime. Furthermore, he refers to the charge, including the term

"willfully," in his "Demand to Strike Surplusages (sic) from Application for Charging Document," which states:

> "The (a)ccused appears specially and not generally in the above captioned action pursuant to Federal Rules of Criminal Procedure and appropriate Maryland Rules demanding that certain prejudicial allegations be stricken (sic) from the charging document and probable cause application to wit: 2. '... did willfully fail to file....'" (Emphasis added.)

We hold that the purpose of the charging document was served. Appellant demonstrated he was aware of the accusations against him.

b. Waiver of Defect

"(W)here no cognizable crime is charged, the court lacks fundamental subject matter jurisdiction to render a judgment of conviction...." Williams, supra at 792. In the case sub judice, the crime of willful failure to file tax returns was cognizable because the

charging document adequately characterized the crime and informed appellant of the conduct with which he was charged. Id. at 791. Thus, the court had jurisdiction over this matter.

A defect in the charging document other than its failure to show jurisdiction in the court or its failure to charge an offense shall be raised by motion in conformity with this Rule and if not so raised is waived. Rule 4-252(a)(2). "A motion under section (a) of this Rule shall be filed within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the court...." Rule 4-252(b). Appellant's initial appearance before the court occurred on May 6, 1985. In accordance with the Rule, appellant had until June 5, 1985 to raise any nonjurisdictional defects. He waived his

right to challenge the defect in the statement of charges by waiting until the morning of the trial to raise the objection. Chaney, supra. Accordingly, since the statement of charges in the case sub judice was not jurisdictionally defective and was not challenged in a timely fashion, appellant's contention is without merit.

- Prosecutorial Authorization -

Appellant also alleges that, even if the court was correct in applying both charging documents, the prosecutor was not authorized to litigate the case. Appellant contends that "(p)rosecution may be by the Attorney General when authorized by implementation of certain constitutional provisions.... The record does not state that authorization was given for this action (investigation or prosecution)."

The state asserts that appellant has waived this issue for our review. Conceding that before trial appellant sought removal of the Attorney General and appointment of a "public prosecutor," the State suggests that appellant's objection was based on his assertion that the Attorney General manifested a conflict of interest when it swore out the probable cause application in support of the statement of charges. The State argues that at no time did appellant specifically complain that the Attorney General lacked the necessary authorization needed to prosecute this matter.

The authority of the sovereign to govern and exercise control is jurisdictional. 50 C.J.S. Jurisdiction Sect. 320 (Supp. 1985). A question of jurisdiction may be raised at any time.

Cooper v. State, 44 Md. App. 59, 63 (1979). Appellant's objection is a jurisdictional one and hence may now be raised.

Article V, Section 3(a) of the Constitution of Maryland sets out the duties of the Attorney General, including, inter alia:

> "(2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct to be investigated, commenced and prosecuted or defended.
>
> "(3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting officer in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any Court of this State."

In State v. Hunter, 10 Md. App. 300, 305-06 n.5, (1970), this Court noted that under Art. V, Sect. 9 of the Constitution of Maryland the power to prosecute at trial level formerly vested in the common law office of Attorney General passed to the State's Attorney. In State v. Aquilla, 18 Md. App. 487, 493-94, cert. denied, 269 Md. 755 (1973), we reaffirmed that responsibility for prosecuting criminal cases at the trial level devolved upon the State's Attorney. Specific authority under Art. V, Sect. 3(a)(3), supra, is necessary for someone other than the State's Attorney to prosecute a criminal case.

In the case, sub judice, the record is barren of any evidence that the Governor or General Assembly conferred on the Attorney General the authorization to investigate and prosecute State income

tax violations, although the State asserts in its brief that such authority exists in a letter dated March 9, 1984 signed by Governor Hughes. Since we are restricted to the record, we order a limited remand under Rule 1071 to the trial court for the sole purpose of ascertaining whether the Attorney General possessed authority to maintain this prosecution. If on remand the court determines that the Attorney General possessed the requisite authority, the judgments of conviction entered are affirmed pursuant to our holdings on the remaining issues. If, however, on remand the court determines that the Attorney General lacked the authority to prosecute, the judgments of conviction are vacated and set aside.

PANEL JUROR

Appellant claims the court erred in

failing to exclude or isolate an Internal Revenue Service agent on the voir dire jury panel because "(t)his (juror) remained a member of the jury panel for an extensive period of time...sat with persons who ultimately constituted the jury of twelve throughout the voir dire...had ample opportunity to affect the impartiality of the jury, and did in fact make comments regarding 'tax protests.'"

The record reflects that juror number 24 was an I.R.S. agent. During voir dire questioning, this juror was struck for cause by appellant. The record reflects that he answered affirmatively the question whether he knew the attorneys in the case and whether he had previously served on a jury panel.[1]

[1]That is the full extent of the record relating to this juror.

The record is barren, however, of even a hint of any prejudicial comments made by this juror. It is equally barren of any objections made by appellant to such alleged comments. Failure of appellant to object contemporaneously to any improper remarks made by a prospective juror or to object prior to his expression that he was satisfied with the jury as empaneled, waives appellant's right to review of this issue. Rule 1085; see White v. State, 300 Md. 719, 729 (1984), cert. denied, 470 U.S. , 105 S. Ct. 1779, rehearing denied, 476 U.S. , 105 S. Ct. 2351 (1985).

In any event, there is no merit to appellant's allegation. Unlike Commonwealth v. Harkins, 328 A.2d 156 (Pa. 1974), cited by appellant, the "prejudicial" remarks of juror 24 in the case sub judice, were not set out on the

record, nor stated obviously in the presence of all prospective jurors. In Harkins, supra, a prospective juror announced aloud that he should not hear the trial because "he (indicating the defendant) stole my car." Id. at 157.

Moreover, appellant does not suggest in what manner he was prejudiced by the remarks or the extent of prejudice. Instead, he merely asserts the remarks were prejudicial. We hold the court did not err in failing to exclude or isolate from the jury panel a tax agent.

MARYLAND TAX LAW

Appellant contends that the Maryland income tax laws violate due process. To this end, he asserts his duty to file a return under Md. Code Ann. Art. 81 Sect. 320 (1957, 1980 Repl. Vol., 1985 Cum. Supp.) was not stated with sufficient clarity and certainty because the law

does not state that wages are equal to income. We disagree.

Section 294 of Art. 81, supra, creates a duty on the part of each Maryland resident to file a tax return form with the comptroller. Md. Code Ann. Art. 81, Sect. 294, supra. The Code also imposes both civil and criminal sanctions for failure to comply with Sect. 294, supra, Md. Code Ann. Art. 81, Sect. 320, supra. The comptroller is directed under Md. Code Ann. Art. 81, Sect. 304(a), supra, to "apply as far as practicable the administration and judicial interpretation of the federal income tax law." Comptroller of the Treasury v. Chesapeake Corp., 54 Md. App. 208, 214, cert. denied, 296 Md. 653 (1983). Section 6012 of 26 U.S.C. (1982) requires a married person to file when his or her gross income exceeds $5400. Gross income is

defined in 26 U.S.C. Sect. 61 (1982) as "the total of incomes." Although a number of items or sources of income are listed, none of these include wages in exchange for labor. It is clear, however, that wages for labor is implied in the phrase "income from whatever source derived," as provided in 26 U.S.C. Section 61, supra. We hold that appellant's duty to file was stated with sufficient specificity.

MARYLAND TAX FORMS

Appellant argues that the "comptroller ...has arbitrarily and capriciously prescribed income tax forms...(which) discriminate against the equal opportunity of Maryland residents receiving wages for labor to freely and voluntarily assert the consideration given in the contract for labor." He further contends that "the structure of the federal...and

Maryland...forms for individual income tax returns discourages, and inhibits, the voluntary entry of the information necessary to sever income from wages for labor."

The Maryland income tax law clearly states a duty to file a tax return form. Md. Code Ann. Art. 81, Sect. 294, supra. These forms do provide a "space" or "line" for income. They may, however, be added to in any manner. Appellant could easily have attached his request for an exemption to the form when he returned it, rather than ignore his duty to file. Further, if appellant claims he is exempt from filing because his wages equaled his labor, he must prove that such an exemption exists. State Tax Commissioner v. Baltimore Block and Tile Co., 180 Md. 620, 627 (1942). Appellant failed to demonstrate that this exemption was

authorized by law. Thus, appellant's contention is without merit.

SUFFICIENCY OF THE EVIDENCE

The State presented evidence to demonstrate that appellant's failure to file tax returns for 1981-1983 was willful. Appellant contends the evidence shows a lack of willfulness on his part, and claims a defense of subjective mistake of law. Where two opposing inferences may be drawn from the same evidence, the jury is at liberty to believe whichever inference it chooses. Pinkney v. State, 12 Md. App. 598, 604, cert. denied, 263 Md. 781 (1971).

The following evidence was presented by the State. Appellant did file an income tax return in 1978 but not thereafter. In 1982, however, he submitted a withholding form to his employer stating that he "did not owe any

Maryland income tax." Appellant sent a letter to his employer requesting the return of a signed affidavit "in order to eliminate the possibility of an accusation of having filed a fraudulent withholding form." After receiving a letter from the office of the comptroller which informed appellant that he was not exempt from withholding tax, and which reported that his employer had been instructed to begin withholding taxes from his wages, appellant threatened to institute legal action against his employer. Appellant refused to file the tax forms for years 1979 and 1983 that were sent to him by a revenue specialist with the office of the comptroller. Interestingly, appellant demanded cash from the tenants of his rental property and preserved no record or receipt of this income.

"(W)illfulness may be established through proof that the accused's failure to file constituted a voluntary intentional violation of a known legal duty, not the result of accident or mistake or other innocent cause." Johnson v. State, 294 Md. 515, 518-19 (1982). The reasonable inference could be drawn from the filing of a 1978 tax return form that appellant knew of the duty to file income tax returns yearly. His actions and correspondence with his employer demonstrate he understood the requirement of filing. Further, it was not unreasonable to infer that appellant demanded cash from his tenants to avoid declaring the rental income on his return. It was reasonable to conclude, therefore, that he did not have a "mistaken understanding of the law," as he claims.

Appellant points to State's Exhibit 4B and 5 to suggest the State established and proved a subjective mistake of law on his part. State's Exhibit 4B was an affidavit prepared and signed by appellant in which he stated that he was neither liable for any income tax nor required to submit an employee withholding exemption certificate. Exhibit 5 was a letter sent by appellant to his employer, which stated that the I.R.S. tax regulations did not apply in his case. Also submitted as part of Exhibit 5 was an MW-4 certificate with the word "incorrect" written in capital letters across its face.

Appellant confuses the possible existence of a defense with evidence sufficient to disprove willfulness. As stated, the jury was free to draw reasonable inferences from the evidence

presented, Pinkney, supra, and the evidence was sufficient to prove the element of willfulness beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); Tichnell v. State, 287 Md. 695, 717 (1980).

JURY INSTRUCTIONS

Appellant argues that the trial court's instructions on willfulness were erroneous because they failed to inform the jury of the subjective mistake of law defense, and insufficient because they incorrectly explained willfulness. Appellant has failed to preserve these issues for our review. Rule 4-325(e). He did not object to the jury instruction on willfulness, either in discussion at the bench before the instruction was given, or immediately after it was read to the jury. On both occasions,

appellant had the opportunity to object and did not do so. He did, however, object to other instructions at both times.

In any event, we find no error in the instructions. The Court of Appeals has held that "attention should not be focused on a particular portion (of the challenged instructions) lifted out of context, but rather its adequacy is determined by viewing it as a whole." Poole v. State, 295 Md. 167, 186 (1983), quoting State v. Foster, 263 Md. 388, 397 (1971), cert. denied, 406 U.S. 908 (1972).

In the case sub judice, the instruction given by the court was as follows:

> "As I instructed you an element of the crime with which the (d)efendant is charged is wilfulness. As used in the criminal law <u>wilfully characterizes an act which is done knowingly and with</u>

deliberate intention for which there is no reasonable excuse. The element of deliberate intention requires that there be a full and conscious design to violate the law. You are instructed that the (d)efendant's conduct is not wilful if he acted through negligence, inadvertence, justifiable excuse or mistake, or due to his good faith misunderstanding of the requirement of the law. However, mere disagreement with the law in and of itself, does not constitute good faith misunderstanding of the requirements of the law, because it is the duty of all persons to obey the law whether or not they agree with it. Stated otherwise, while a good faith misunderstanding of the law may negate wilfulness, a good faith disagreement with the law does not. Furthermore, any misunderstanding must be in good faith." (Emphasis added).

Appellant contends that the use of the phrase "no reasonable excuse" to explain willfulness negated the defense of subjective mistake of law. While the trial judge did use this language in the instruction, the language was explained. The court provided examples of situations where the defendant's conduct would not be deemed willful, and followed this with

contrasting examples where willfulness would be present. He defined "good faith misunderstanding," and distinguished it from mere disagreement with the law. Finally the judge emphasized that any misunderstanding must be in good faith.

Thus, in light of the trial judge's clarifications and explanations, when the instruction is read in toto, it is correct. Therefore, appellant's contentions that the instruction was erroneous and insufficient to prove willfulness are without merit.

CASE REMANDED WITHOUT AFFIRMANCE OR REVERSAL TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY FOR THE PURPOSE OF CONDUCTING A HEARING ON THE AUTHORITY OF THE ATTORNEY GENERAL TO PROSECUTE THESE CHARGES.

THE JUDGMENTS ON CONVICTION REMAIN IN

EFFECT PENDING FURTHER PROCEEDINGS.

COSTS TO BE PAID FIVE-SIXTHS BY APPELLANT AND ONE SIXTH BY ANNE ARUNDEL COUNTY.

CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

COMMITMENT RECORD

State of Maryland v. John Emil Bomhardt

Criminal Case No. 9216 DOB: 01/27/29

Docket: Folio:

Term: September 1985

Trial by Court

Judge: Hon. Eugene M. Lerner

Date of Verdict: 10/10/85

Date Sentence Imposed: 11/22/85

Court charge:

1. Failure to file income tax return

   Plea: Not Guilty Verdict: Guilty

2. Failure to file income tax return

   Plea: Not Guilty Verdict: Guilty

3. Failure to file income tax return

Plea: Not Guilty Verdict: Guilty

Prisoner is committed to the jurisdiction of the Superintendent of the Anne Arundel County Detention Center commencing on 11/22/85 for a period of:

Count	Years	Months	Days
1		6	Concurrent
2		6	Consecutive
3		6	Consecutive

WT #2 CONS TO WT #1 & WT #3 CONS TO WTS. #1&2

Truly taken from the docket proceedings of the Circuit Court for Anne Arundel County, in testimony whereof, I hereunto set my name and affix the Seal of the said Court this 22nd day of November, 1985.

E. Aubrey Collison, Clerk
Circuit Court for Anne Arundel County